In the Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, vs. THE BOROUGH OF NEW HOPE, Defendant in Error.	October Term, 1902. No. 101.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error claims (1) that affirmative evidence that no expense whatever has been incurred by the defendant in error in respect to the poles and wires, which are the subjects of the provisions of the ordinance in question, rebuts the presumption of the reasonableness of the license fees prescribed thereby, raised by the adoption of said ordinance, and (2) that said ordinance therefore imposes a burden upon and is a regulation of, interstate commerce and is void as to plaintiff.

In reply to this the defendant in error respectfully submits:

1. The possession of power by the municipality to inspect and regulate the erection and maintenance of poles and wires

in its streets implies a duty to do so, which duty, it is presumed, the municipality will discharge. It is empowered therefore to impose license fees to indemnify it against, or reimburse it for, any expense which may be incident to such supervision and regulation. It is not a condition precedent to this exercise of its police power, however, that it actually shall have incurred such expenses. In some instances that would be not only impracticable but impossible. A company constructing a new line would be required to take out a license to erect its poles and string its wires before commencing the work of construction. At that time no expense of supervision could have been incurred. The fees prescribed by this ordinance have not been fixed with reference to the value of the company's property located within the municipal limits of the borough, or the amount of the gross receipts of the business of the company, transacted there in a given period. The proportion which they bear thereto is an irrelevant consideration. The Supreme Court of Pennsylvania, in affirming a judgment of the court below, has thus stated the rule by which the reasonableness of the license fee imposed is to be determined:

> "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires, or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as the municipal authorities may lawfully give to the erection and maintenance of the poles and wires."
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> Taylor Borough vs. Postal Tel. Co., 202 Pa. 583, 584.

In another case in which it was averred in the affidavit of defense that the rates charged were at least five times the

amount of the expense involved in the supervision exercised by the municipality, the Supreme Court of Pennsylvania said :

> "For the purposes of this case we must treat this averment as true as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expenses of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

Chester City vs. Western Union Telegraph Company, 154 Pa. 466.

The rate of license fees fixed in this ordinance is one dollar per pole and two dollars and fifty cents per mile of wire, per annum, which are the rates prescribed in the ordinances in the cases cited by the court below in its opinion in this cause (Record page 5). In none of these cases were these rates declared to be unreasonable. In the present instance the annual charge imposed upon the plaintiff in error amounts to sixty-six dollars a year, or five and a half dollars per month. The fixing of these rates by the Borough Council in the first instance, it is conceded by the plaintiff in error, is *prima facie* evidence of the reasonableness of the ordinance,

and, it is respectfully submitted, there is nothing in the record of this cause that rebuts the presumption.

2. While it is admitted that the business in which the plaintiff in error is engaged is interstate commerce and that the poles and wires which it maintains within the limits of the Borough of New Hope are instruments which it uses in the conduct of its business, it is denied that such property is exempt from the police regulations of the municipality. While the municipality is without power to exclude these poles and wires from its streets, public welfare requires it to see that said poles and wires are not so erected or maintained as to become a menace to the safety of those who use its streets as highways. This involves the right and the duty of regulation by the borough and such regulation under the police power is not an attempt to regulate the business of the telegraph company. This case is easily distinguishable from those of Brown vs. Maryland, 12 Wheat. 419, Almy vs. State of California, 24 How. 169, 173, Leloup vs. Port of Mobile, 127 U. S. 640, Brennan vs. City of Titusville, 153 U. S. 589, and others cited by the plaintiff in error.

This Court has clearly indicated the distinction in the following language :

> " In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce

and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list: *Case of State Freight Tax, 15 Wall. 232; Pensacola Telegraph Company vs. Western Union Telegraph Co. 96 U. S. 1; Mobile vs. Kimball, 102 U.S. 691; Western Union Telegraph Co. vs. Texas, 105 U. S. 460; Moran vs. New Orleans, 112 U S 69; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196; Brown vs. Houston, 114 U. S. 622; Walling vs. Michigan, 116 U. S. 446; Picard vs. Pullman Southern Car Co., 117 U. S. 34; Wabash Railway Co. vs. Illinois, 118 U. S. 557; Robbins vs. Shelby County Taxing District, 120 U S. 489; Philadelphia & Southern Steamship Co. vs. Pennsylvania, 122 U. S. 326; Western Union Telegraph Co. vs. Pendleton, 112 U. S. 347; Ratterman vs. Western Union Telegraph Co. ante 411*

"We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage and the like. We have recently had before us the question of taxing the property of a telegraph company in the case of *Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530.*"

Leloup vs. Port of Mobile, 127 U. S. 640.

And again in a Pennsylvania case, the same distinction was drawn in the following language:

> "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of the long line of decisions that it is well settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Brennan vs. Titusville, 153 U. S. 289.

It is therefore respectfully submitted:

1. That the provisions of this ordinance do not constitute an attempt on the part of the municipality to regulate or impose a burden upon interstate commerce.

2. That the adoption and enforcement of said ordinance is a lawful exercise of the police power with which said borough is vested under the Constitution and laws of Pennsylvania.

WM. C. RYAN,
For Defendant in Error.